IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 731.

In the Matter

of

HENRY GREENBERG,

Debtor-Petitioner,

—against—

I. & I. HOLDING CORPORATION and HARRY BARROW, INC.,

Objecting Creditors-Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Question Presented.

Respondents respectfully submit that the only question herein is whether the Bankruptcy Court should entertain the Debtor's second application for a discharge from his debts, by his filing a petition for an arrangement under Chapter XI, while there remains in full force and effect a prior order made by the same Court in a prior bankruptcy proceeding under Chapters I to VII denying the Debtor's discharge from the same debts listed in the arrangement proceeding.

Statement of Facts.

Over six years ago, on December 13, 1939, an involuntary petition of *bankruptcy* was filed in the Bankruptcy Court in the Eastern District of New York against the Debtor herein and he was duly adjudicated a bankrupt by that Court (p. 14).

Thereafter, objections to the bankrupt's discharge were sustained, and his discharge was denied on the ground that he was guilty of the acts and failed to perform the duties which bar his discharge under the Bankruptcy Act, to wit, fraudulent transfers, false financial statement, false oath, failure to keep books and failure to satisfactorily explain the loss of his assets (p. 3). The order denying the bankrupt's discharge was made by Referee Howard A. Fluckinger, and was confirmed (p. 12) by the order of the District Court, Galston, *J.*, dated July 27, 1942 (reported at 46 F. Supp. 289).

Two years went by, and the time of the bankrupt to appeal from the order denying his discharge had expired, and no motion was made by him to vacate or set aside the order denying his discharge.

Then on June 30, 1944 the bankrupt filed a petition, as a Debtor, for an arrangement under Chapter XI, in which he listed the same creditors who were listed in his prior bankruptcy proceeding. In other words, the Debtor listed exactly the same debts with reference to which his discharge was denied two years before.

In the Debtor's petition for an arrangement he asked the Court (a) to compel those same creditors to accept a 1% settlement in full for their claims, (b) to vacate the order entered two years prior denying his discharge, and (c) to grant his discharge from those same debts.

After the Debtor filed his petition for an arrangement, Referee Fluckinger, the same Referee as in the prior bankruptcy proceeding, gave notice (p. 34) that a meeting of creditors would be held on August 23, 1944 to consider the plan of arrangement giving the creditors 1% in full discharge of their claims (p. 11). At that meeting, the respondent I. & I. Holding Corporation, by verified petition (pp. 36 *et seq.*) called to the Referee's attention his order which he had signed on April 17, 1942 denying the Debtor's discharge from the same debts, and the order (p. 12) of the District Court, Galston, *J.*, which confirmed the Referee's order denying the Debtor's discharge. Respondent asked the Referee to dismiss the Debtor's petition for an arrangement discharging his debts on the ground that there was on file an order of the same Referee which was still in full force and effect denying the Debtor's discharge as to the same debts, and that, furthermore, the Debtor could not be discharged in the arrangement proceeding in view of Sections 366 (Subdivision 4) and 376 of the Bankruptcy Act, as he had been already found guilty of acts which barred his discharge.

The issue herein was a question of law. There was no question of fact. All the facts are matters of record and admitted by the Debtor.

Referee Fluckinger overruled the objections and made an order dated December 20, 1944 granting the Debtor's discharge from those same debts, and vacating his own prior order dated April 17, 1942 which denied the Debtor's discharge from those debts, and which had been confirmed by Judge Galston's order dated July 27, 1942.

The respondents herein then moved the District Court, Galston, *J.*, to review the Referee's order

dated December 20, 1944 granting the Debtor's discharge and confirming the arrangement plan; and the respondents asked the District Court (a) to vacate that order, and (b) to dismiss the Debtor's petition for an arrangement (pp. 25 and 26).

The District Court, Galston, *J.*, granted respondents' motion so far as to vacate Referee Fluckinger's order dated December 20, 1944, but the District Court referred back the matter to the Referee to go forward with the whole arrangement proceedings (p. 41, fol. 121).

It is respectfully submitted that it would be unfair and unnecessary to require the creditors to proceed with the expense and labor of the hearings of the arrangement proceeding and a second trial, between the same parties, of the same objections to the Debtor's discharge which had already been tried and decided against the Debtor. There was no question of fact to be determined, and Referee Fluckinger had passed upon the only question of law involved in the case. The District Court should have dismissed the Debtor's petition for an arrangement.

The respondents then appealed from the District Court to the Circuit Court of Appeals, Second Circuit. The Circuit Court of Appeals granted respondents' prayer, and reversed the District Court and directed that the Debtor's petition for an arrangement be dismissed in view of the fact that there remained in full force and effect a filed order denying the Debtor's discharge from the same debts in the prior bankruptcy proceeding.

This bankruptcy case, of an individual debtor, is now in its seventh year. The Debtor has been very assiduous in keeping his creditors engaged in the Bankruptcy Courts, and now the creditors need the

aid of the Court to prevent the Debtor from imposing upon and abusing the processes of the Bankruptcy Court, and to protect the creditors from the Debtor's attempt to retry the issue of discharge already decided against him.

POINT I.

The Circuit Court of Appeals had jurisdiction of the appeal.

In the case of *Securities & Exchange Commission* v. *U. S. Realty Improvement Co.* (1940), 310 U. S. 434, 84 L. Ed. 1293, it was held that an aggrieved party was entitled to appeal from an order of the Bankruptcy Court refusing to dismiss an arrangement proceeding under Chapter XI. The Court also held that it was the duty of the Bankruptcy Court to dismiss a proceeding whenever it appeared that a fair and equitable plan was not feasible, and that the aggrieved party had the right to appeal and challenge the exercise or non-exercise by the District Court of its jurisdiction. In the instant case it would be absolutely futile for the Referee to go through all the formalities of a proceeding under Chapter XI. The Referee cannot ignore his prior order denying the bankrupt's discharge, and regardless of the formality with which he conducts the proceeding under Chapter XI the result must be that the proceeding be dismissed.

See also *Dudley* v. *Mealey* (1945) (C. C. A. 2), 147 F. 2d 268.

POINT II.

The denial of the bankrupt's discharge from the same bankruptcy proceeding is *res judicata*.

In re Freshman v. *Atkins* (1925), 269 U. S. 121, at page 124, the Court said:

> "Denial of the discharge from the debts provable, of failure to apply for it within the statutory time, bars an application under a second proceeding for a discharge from the same debts."

There are numerous cases in various jurisdictions directly in point:

In re Colewell v. *Epstein* (1944) (C. C. A. 1), 142 F. 2d 138;

Duggins v. *Heffron* (1942) (C. C. A. 9), 128 F. 2d 546, affirming 46 Am. B. R. (N S) 671;

In re Chopnick v. *Tokatyan* (1942) (C. C. A. 2), 128 F. 2d 521;

In re Perlman v. *322 West Seventy Second Street Co.* (1942) (C. C. A. 2), 127 F. 2d 716;

In re Perlman (1940) (C. C. A. 2), 116 F. 2d 49;

In re Summer (1939) (C. C. A. 2), 107 Fed. 2nd 396, cert. denied 309 U. S. 680;

In re Hill v. *Railroad Industrial Finance Company* (1937) (C. C. A. 10), 92 Fed. 2d 973;

Sawyer v. *Orlov* (1926) (C. C. A. 1), 15 F. 2d 952, cert. den. 274 U. S. 736;

In re Kuffler (1907) (C. C. A. 2), 151 Fed. 12; see also *In re Kuffler* (1907) (E. D. N. Y.), 155 F. 1018;

In re Semons (1906) (C. C. A. 2d), 140 Fed. 989;
In re Zeiler (1937) (S. D. N. Y.), 18 F. Supp. 539;
In re Bishop (1936) (W. D. N. Y.), 13 F. Supp. 905;
In re Mayer (1933) (E. D. N. Y.), 4 F. Supp. 203;
In re McMorrow (1931) (W. D. N. Y.), 52 Fed. 2d 643;
In re Brislin (1931) (N. D. N. Y.), 10 Supp. 181;

In *Sawyer* v. *Orlov, supra,* the Court held that the denial of a composition, by reason of a transfer in fraud of creditors, was *res judicata* as to the bankrupt's right to a discharge in a subsequent bankruptcy proceedings, and denied a discharge to the bankrupt.

See also *In re Klein's Outlet, Inc.* (1942) (S. D. N. Y.), 50 F. Supp. 557.

POINT III.

The Court will take judicial notice of its own order denying the Debtor's discharge.

In the case of *Freshman* v. *Atkins* (1929), 269 U. S. 121, the Court said (p. 123) that where there has been a prior discharge proceeding already adjudged or still pending, the Court will on its own motion refer to its own records of the prior proceeding. At page 124, the Court reprimanded the bankrupt for his conduct in ignoring the first proceeding, and said:

> "To ignore it and make a second application, involving a new hearing, was an imposition upon

and an abuse of the process of the court, if not a clear effort to circumvent the statute by enlarging the statutory limitation of time within which an application for a discharge must be made. In such a situation the court may well act of its own motion to suppress an attempt to overreach the due and orderly administration of justice. What is said in the *Fiegenbaum* case, 57 C. C. A. 409, 121 Fed. 70, is appropriate here:

> 'Not only should the court of bankruptcy protect the creditors from an attempt to retry an issue already tried and determined between the same parties, but the court, for its own protection, should arrest, *in limine*, so flagrant an attempt to circumvent its decrees.' "

POINT IV.

The Referee's decision was erroneous.

The Referee herein in his decision said that the filing by the Debtor of his petition for arrangement in 1944 "has the legal effect of raising the discharge question *de novo*" (fol. 45). And the Referee without further hearing, vacated (p. 10) that discharge order and confirmed the arrangement, thereby directly violating Section 366(4) which provides that a discharge shall not be granted where the Debtor has been found guilty of acts barring his discharge.

Under the Referee's interpretation of the law, all guilty bankrupts could "vacate" the orders denying their discharge by merely filing a second bankruptcy petition for an arrangement; and, according to the Referee, those guilty bankrupts could effect that result regardless of how many years had elapsed since their discharge had been denied.

The Referee, in his decision herein, said that the Debtor's petition herein for an arrangement "is in the nature of an answer, or responsive pleading, to the original bankruptcy proceeding and has the effect of superseding in every way the original bankruptcy proceeding" (fol. 44). We believe that the Referee was in error.

In the first place, the time of the Debtor to *answer* in the original bankruptcy proceeding, expired years before on December 29, 1939, and the Debtor had defaulted and was consequently adjudicated a bankrupt on that date.

In the second place, Section 325 expressly provides that the filing of a petition for an arrangement shall not stay the prior bankruptcy proceeding; but that the Court may grant such a stay upon notice to all creditors. No such notice has been given herein and no order staying the prior bankruptcy proceeding has been entered.

The Referee in his decision overlooked the limitation which Congress expressly provided by enacting Section 366(4). A Debtor, although he filed a petition under Section 321, cannot possibly have his plan confirmed if he has been guilty of any act which bars his discharge as a bankrupt.

POINT V.

Whether the prior bankruptcy proceeding and the subsequent arrangement proceeding, are considered separate proceedings or one combined proceeding, the fact is that the Debtor's application for a discharge has been tried and decided against him.

A proceeding under Chapters I to VII of the Bankruptcy Act, and a proceeding under Chapter XI of the Bankruptcy Act, both operate as applications for a discharge. See Section 14a and Section 371. Therefore the Debtor herein must be deemed under the Bankruptcy Law to have made two applications for his discharge.

As a valid order was entered denying his first application for a discharge in the prior bankruptcy proceeding, then that order, while it remains in force and effect, is a bar to a second application by the Debtor for a discharge from the same debts, whether made in the same proceeding or in a subsequent proceeding.

As a matter of clear logic when the order was made denying his discharge in bankruptcy, there remained nothing on which a subsequent application for an arrangement could operate.

In the instant case, the Debtor listed in his petition for an arrangement the very same creditors as in the prior bankruptcy proceeding. There were no new or additional creditors. In fact, the Debtor filed his petition for an arrangement under Section 321, in the same pending bankruptcy proceeding in which his discharge was denied, and under the same file number (#38181). The Debtor's contention that he has a right to file a second application for a discharge

in an arrangement proceeding, just because his prior bankruptcy proceeding, in which his discharge was denied, is still pending, is frivolous. That would mean that a bankrupt whose discharge has been denied but whose bankruptcy proceeding was still pending would have the right to retry the issue of his discharge by filing a petition under Chapter XI, but that a similar bankrupt whose bankruptcy proceeding has been closed even one day would not have the right to retry the issue of his discharge.

POINT VI.

The Debtor did not obtain new rights by changing his residence.

The Debtor's contention, on page 9 of his brief, that his change of residence since his prior bankruptcy and the denial therein of his discharge, entitled him to a retrial thereof, by the same Court which denied his discharge, is clearly frivolous.

CONCLUSION.

The objecting creditors respectfully pray that the Debtor's petition for a writ of certiorari be denied.

Respectfully submitted,

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